No. 971364 FEB 19 1998
OFFICE OF THE CLERK

In The
Supreme Court of the United States
October Term, 1997

ROBERT S. SPRINGSTON
Petitioner,

v.

CONSOLIDATED RAIL CORPORATION, et al.;
Respondents.

Petition For A Writ Of Certiorari To The United States Court of Appeals For The Sixth Circuit

PETITION FOR WRIT OF CERTIORARI
with Appendix

PATRICIA A. WALKER
RALPH E. JOCKE
WALKER & JOCKE
231 South Broadway
Medina, Ohio 44256

(216) 722-5567

Attorneys for Petitioner

*JOHN D. LIBER
SPANGENBERG, SHIBLEY & LIBER
1900 East Ninth Street
2400 National City Center
Cleveland, Ohio 44114-3400

(216) 696-3232
**Counsel of Record*
Attorneys for Petitioner

February 19, 1998

LEGAL ADVANTAGE * 432 Walnut Street * Cincinnati, OH 45202
(800) 581-2252

98 PP

QUESTION PRESENTED FOR REVIEW

Whether the district court and court of appeals erred as a matter of law in holding that Plaintiff's state law tort claims for lack of locomotive conspicuity devices were preempted by federal law.

LIST OF PARTIES TO PROCEEDINGS

IN THE COURT BELOW

The following persons and entities were parties before the United States Court of Appeals for the Sixth Circuit: Petitioner Robert Springston, Respondent Consolidated Rail Corporation, and Respondent General Motors Corporation.

TABLE OF CONTENTS

	Page
Question Presented for Review	i
List of Parties to Proceedings in the Court Below	ii
Table of Contents	iii
Table of Authorities	iv
Opinions Below	1
Statement of Jurisdiction	2
Statutes Involved	3
Statement of the Case	3
Reasons for Granting the Writ	8
Conclusion	26

TABLE OF AUTHORITIES

Page

Cases Cited:

CSX Transp., Inc. v. Easterwood,
507 U.S. 658 (1993) 10

Cipollone v. Liggett Group, Inc.,
505 U.S. 504 (1992) 10, 11

County of Hillsborough v. Automated
Medical Labs, 471 U.S. 707 (1985) 10

DeElena v. Southern Pac. Co.,
(1979), 121 Ariz. 563, 592 P.2d
759 . . . . . 12, 19

Henry v. District Court of the Seventeenth
Judicial District, (1982),
198 Mont. 8, 645 P.2d
1350 . . . . . 9, 12, 13, 14

Hogue v. Southern Pacific Co.,
460 P.2d 965 (Cal. 1969) 20

In re Miamisburg Train Derailment Litigation,
68 Ohio St. 3d 255, 626 N.E.2d 85
(1994) 22

TABLE OF AUTHORITIES (continued)

Page

Cases Cited:

Marshall v. Burlington Northern, Inc.,
720 F.2d 1149 (9th Cir. 1983) . . 8

Metropolitan Life Ins. Co. v. Massachusetts,
471 U.S. 724 (1985) 11

Rucker v. Norfolk & W. Ry. Co.,
381 N.E.2d 715 (Ill. Ct. App. 1978) 21

Rucker v. Norfolk & W. Ry. Co.,
369 N.E.2d 534 (Ill. 1979) . . . 22

Runkle v. Burlington Northern R.R. Co.,
188 Mont. 286, 613 P.2d 982
(Mont. 1980) 9, 11, 12, 14

Seaboard Coast Line R. Co. v. Buchman,
(Fla. App. 1978) 358 So.2d 836 . 12

Silkwood v. Kerr-McGee Corp.,
464 U.S. 238 (1984) 10

Statutes Cited:

28 U.S.C. § 1254(1) (1988) 3

49 U.S.C. § 20101 (1994) 3, 18

TABLE OF AUTHORITIES (continued)

Page

Statutes Cited:

49 U.S.C. § 20102 (1994) 3, 18

49 U.S.C. § 20106 (1994) 3, 18

49 U.S.C. § 20143 (1994) 3, 18

49 U.S.C. § 20301 (1994) 3, 15

49 U.S.C. § 20302 (1994) 3, 15

45 U.S.C. § 22 (1924) (repealed) . 3, 15

45 U.S.C. § 23 (1924) (repealed) . . . 3

45 U.S.C. § 421 (1992) (repealed) . . . 3

45 U.S.C. § 431(u) (1992)
(repealed) 3, 16, 17

45 U.S.C. § 434 (1992) (repealed) . 3, 16

In the
Supreme Court of the United States

October Term, 1997

NO. _____

ROBERT S. SPRINGSTON,

Petitioner,

v.

CONSOLIDATED RAIL CORPORATION, et al.

Respondents.

Petition for Writ of Certiorari
to the United States Court of Appeals
for the Sixth Circuit

PETITION FOR WRIT OF CERTIORARI

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Sixth Circuit appears in the appendix to this petition (App. A) and has been reported at 130 F.3d 241 (6th Cir. 1997).

Also in the appendix are the Order of the United States Court of Appeals for the Sixth Circuit denying Springston's Petition for Rehearing en banc, and the Opinion of the District Court for the Northern District of Ohio (David D. Dowd, Jr., D.J.) granting Respondents' motions for summary judgment on the issue of whether federal law preempted Petitioner's state law tort claims regarding locomotive conspicuity devices (App. C). Judge Dowd's Opinion has been reported at 863 F.Supp. 535 (N.D. Ohio 1994).

STATEMENT OF JURISDICTION

On November 19, 1997, the United States Court of Appeals for the Sixth Circuit entered judgment affirming the decision of the United States District Court for the Northern District of Ohio. The Sixth Circuit held that Petitioner's state law tort claims against Respondents regarding locomotive conspicuity devices were preempted by federal law. The jurisdiction of this Court is

invoked pursuant to 28 U.S.C. § 1254(1) (1988).

STATUTES INVOLVED

This case involves the application of several provisions of the Federal Railroad Safety Act ("FRSA"), 45 U.S.C. §§ 421, 431(u) and 434 (1992) (repealed), and several provisions of its successor, the Federal Railroad Safety Authorization Act, 49 U.S.C. §§ 20101, 20102, 20106, and 20143 (1994). This case also involves the application of several provisions of the Locomotive Boiler Inspection Act ("LBIA"), 45 U.S.C. §§ 22 and 23 (1924) (repealed), and several provisions of its successor, the Federal Safety Appliance Act, 49 U.S.C. §§ 20301 and 20302. The relevant portions of these Acts appear in the appendix to this petition (App. E).

STATEMENT OF THE CASE

This matter arises out of a railroad crossing collision that occurred on June 2, 1991 in Wood County, Ohio, between a

motorist, Petitioner Robert Springston (hereinafter "Springston"), and a locomotive owned and operated by Respondent Consolidated Rail Corporation (hereafter "Conrail"). Mr. Springston was a resident of Illinois. Conrail is a Pennsylvania corporation. Respondent General Motors Corporation (hereafter "GM"), the manufacturer of the locomotive, is a Delaware corporation. As a result of this collision, Mr. Springston was ejected from his vehicle. He is now a quadriplegic.

The crossing in issue was located in a dark, rural setting, and was not protected with active warning devices such as automatic gates and flashing lights. Springston had never been to this crossing before. Therefore, given the absence of automatic gates and flashing lights, it was imperative that this locomotive be equipped with warning devices and safety equipment to make it more conspicuous and discernible to a nighttime

motorist. Unfortunately, this locomotive did not have ditch lights -- twin, high intensity auxiliary lights mounted horizontally on the front of the locomotive base. Ditch lights combined with the headlight create a unique, unmistakable lighting formation which alerts a nighttime motorist that a train is approaching. These devices have been known in the railroad industry for decades.

The locomotive also lacked oscillating lights and strobe lights. An oscillating light is a white light on the front of the locomotive that revolves in a figure eight rotation. Strobe lights perform differently. Strobe lights are mounted on the front of the locomotive and flash high intensity warning signals to nighttime motorists. Had ditch lights, oscillating lights or strobe lights, or any combination thereof been used, the locomotive would have been more discernible and conspicuous to Bob Springston. This

entire tragedy could have been prevented had the locomotive been so equipped.

Mr. Springston filed his diversity action on January 14, 1993 in the United States District Court, Northern District of Ohio. Springston alleged several claims of negligence against Conrail, and alleged product liability claims against GM. On April 1, 1994, both Conrail and GM moved for partial summary judgment on Springston's state law tort claims regarding conspicuity devices, arguing that federal law preempted his claims. On July 5, 1994, the district court granted partial summary judgment for both Conrail and GM, holding that Springston's claims for lack of locomotive conspicuity devices were preempted by federal law. (App. C) The district court held that "it is within the scope of the Secretary of Transportation's authority to prescribe reflective materials or strobe, ditch or oscillating lights for locomotives, and any

state regulation is therefore preempted." (App. C) Furthermore, although the district court acknowledged in a footnote that the LBIA was "clearly enacted for the primary purpose of protecting railroad workers," the court concluded that the preemptive reach of the LBIA encompassed conspicuity devices designed to protect motorists approaching railroad grade crossings. (App. C) Accordingly, the district court held that Springston's state law tort claims were preempted by federal law.

This ruling left Conrail as the sole defendant for trial, and that trial resulted in a defense verdict. Prior to trial, the District Judge, David Katz, issued an opinion granting Conrail's Motion in Limine to bar any evidence concerning the lack of conspicuity devices on the locomotive. (App. D) Judge Katz's opinion was based upon the same preemption grounds articulated in Judge

Dowd's earlier opinion awarding partial summary judgment.

On appeal, the Sixth Circuit affirmed the award of summary judgment, holding that Springston's claims for lack of locomotive conspicuity devices were preempted. The court reasoned that the FRSA did not affect or modify the preemptive effect of the LBIA on state regulation of locomotive equipment. (App. A) Citing only to Marshall v. Burlington Northern, Inc., 720 F.2d 1149 (9th Cir. 1983), the Sixth Circuit concluded that the FRSA did not subsume, replace, or recodify any acts. (App. A)

REASONS FOR GRANTING THE WRIT

The Sixth Circuit has decided an important question of federal law in a way that conflicts with decisions by a state court of last resort, thus implicating Sup. Ct. R. 10(1)(a)-(c). As will be shown, the Sixth Circuit's decision in this case stands in direct conflict with two decisions of the

Supreme Court of Montana, which unambiguously hold that state law tort claims for lack of locomotive conspicuity devices are not preempted by federal law. Specifically, the Sixth Circuit's decision in this case conflicts with Runkle v. Burlington Northern R.R. Co., 188 Mont. 286, 613 P.2d 982 (Mont. 1980), and Henry v. District Court of the Seventeenth Judicial District (1982), 198 Mont. 8, 645 P.2d 1350. The Sixth Circuit's decision is also inconsistent with the history and purpose of the LBIA and the FRSA.

The precise conflict between the Sixth Circuit's decision and the Supreme Court of Montana's decisions is whether the LBIA and the FRSA preempt a plaintiff's state law tort claims for failing to equip a locomotive with conspicuity devices such as ditch lights, oscillating, lights or strobe lights, as well as other reflective devices to make its locomotive more conspicuous to nighttime

motorists approaching railroad grade crossings.

This Court has always maintained a strong presumption against preemption. CSX Transp., Inc. v. Easterwood, 507 U.S. 658, 662 (1993); Cipollone v. Liggett Group, Inc., 505 U.S. 504 (1992). This view was fashioned in part by the Court's consistent refusal to preempt matters of health and safety which have historically been left to the states. County of Hillsborough v. Automated Medical Labs, 471 U.S. 707, 719 (1985). The presumption against preemption is even stronger where the federal law preempts state tort law and provides no federal remedy. Silkwood v. Kerr-McGee Corp., 464 U.S. 238, 257 (1984).

Protecting innocent victims from defective products, and providing compensation to those who are injured by defective products, is traditionally a strong state interest. This Court has admonished

courts to presume that Congress does not intend to preempt traditional areas of state regulation. Metropolitan Life Ins. Co. v. Massachusetts, 471 U.S. 724, 740 (1985). See also, Cipollone v. Liggett Group, Inc., 505 U.S. 504 (1992).

Adhering to this Court's precedent, the Supreme Court of Montana has expressly rejected the argument that a claim for lack of locomotive conspicuity devices is preempted by federal law. In Runkle v. Burlington Northern R.R. Co., 188 Mont. 286, 613 P.2d 982 (Mont. 1980), a nighttime motorist was killed when his pickup truck was struck by a locomotive at a grade crossing that was not protected by automatic gates and flashing lights. The locomotive was not equipped with any conspicuity devices to aid the motorist in discerning it. The Supreme Court of Montana specifically stated that whether the locomotive should have been

equipped with conspicuity devices was a question of fact for the jury:

> Thus it may not be enough for the railroad to protect its crossing with a standard crossbuck, to operate a train within a speed limit or to blow the whistle and ring the bell. The jury is still permitted to determine whether the railroad exercised reasonable care and caution under the circumstances and conditions existing at the time of the accident. Whether a railroad is negligent in a particular manner, such as in failing to provide automatic crossing gates, oscillating headlights, flasher lights, or in failing to reduce its speed is a question of fact for the jury. Id, 188 Mont. at 300, 613 P.2d at 991, citing DeElena v. Southern Pac. Co., (1979), 121 Ariz. 563, 592 P.2d 759, 762; Seaboard Coast Line R. Co. v. Buchman, (Fla. App. 1978) 358 So.2d 836, 839-40.

Two years later, the Supreme Court of Montana reaffirmed the Runkle decision in the case of Henry v. District Court of the Seventeenth Judicial District (1982), 198

Mont. 8, 645 P.2d 1350, appeal dsm'd. on other grounds, 457 U.S. 1101. In Henry, a nighttime motorist was killed at a grade crossing when her vehicle was struck by a locomotive which was not equipped with conspicuity devices. Henry, 198 Mont. at 9, 645 P.2d at 1350. The trial court dismissed plaintiff's state law tort claims for lack of conspicuity devices, holding that such were preempted by the FRSA and LBIA. Id. at 9-10, 645 P.2d at 1351. An immediate appeal to the Supreme Court of Montana ensued. The Montana Supreme Court phrased the issue as follows:

> Whether federal legislation has preempted the state from imposing a common law duty on railroad carriers to have additional warning devices mounted on their locomotives? Id.

In reversing the trial court, the Montana Supreme Court specifically rejected the argument that the LBIA and FRSA preempted all state law tort claims for lack of conspicuity devices. Id. at 12-13, 645 P.2d

at 1352. The court held that claims concerning conspicuity devices go to warning issues, not the illumination issues addressed in the FRSA and LBIA. Accordingly, the court concluded "we hold Congress has preempted the area of illumination devices but not warning devices." Id. at 13, 645 P.2d at 1352.

The Sixth Circuit's decision in this case cannot be reconciled with Runkle and Henry. In this case, the Sixth Circuit simply held that claims concerning locomotive conspicuity devices were preempted. The Sixth Circuit concluded that Congress intended to occupy the entire field of locomotive devices when it enacted the LBIA. The Sixth Circuit added that the FRSA did not affect or modify the preemptive reach of the LBIA, even though it was the first congressional legislation to specifically mention ditch lights, strobe lights or oscillating lights. (App. A) The Sixth Circuit concluded summarily "federal law

preempts plaintiff's claims based upon the need for extra-statutory warning devices on the train."

Not only is the Sixth Circuit's decision in conflict with Runkle and Henry, it is also inconsistent with the history and purpose of the LBIA and the FRSA. First, by express definition, the LBIA was enacted for the purpose of protecting railroad employees, not motorists like Springston. In 45 U.S.C. § 22 (1924), Congress specifically limited the coverage of the LBIA to "employees", defined as "persons actually engaged in or connected with the movement of any train." (App. E.) The LBIA was repealed on July 5, 1994, more than three years after Springston's collision. Its successor, the Federal Safety Appliance Act, does not in any way broaden the class of protected persons beyond railroad employees. 49 U.S.C. §§ 20301 and 20302 (App. E)

Therefore, Springston's state law tort claims would not be preempted unless Congress had passed legislation specifically covering the subject of locomotive conspicuity devices like ditch lights, oscillating lights, strobe lights or other reflective devices. The FRSA was the first Congressional Act to address railroad safety with an eye towards protecting motorists approaching railroad grade crossings. When first enacted in 1970, Congress specifically authorized the States to "adopt or continue in force any law, rule, regulation, order or standard relating to railroad safety until such time as the Secretary has adopted a rule, regulation, order, or standard covering the subject matter of such State requirement." 45 U.S.C. § 434 (App. E) Conspicuity devices were not even mentioned in the FRSA until 1992, one year after Springston's collision, when Congress amplified § 431 of the FRSA. On that basis alone, Springston's claims are not

preempted. Even when § 431 was expanded in 1992, Congress merely directed the Secretary of Transportation to issue interim regulations addressing ditch lights, etc. "not later than December 31, 1992". 45 U.S.C. § 431(u)(2) (App. E) Final regulations on locomotive conspicuity measures would not be required by the Secretary until "June 30, 1994", more than three years after Springston's collision. 45 U.S.C. § 431(u)(3) (App. E) Obviously, since interim and final regulations on the locomotive conspicuity devices would not be issued until years after Springston's collision, the Secretary had not adopted a rule or regulation "covering" the subject matter of Springston's state law tort claims. Therefore, Springston's claims are not preempted.

Finally, Congress repealed the FRSA in 1994 and replaced it with the Federal Railroad Safety Authorization Act, 49 U.S.C.

§ 20101 et seq, and revisited locomotive conspicuity measures in 49 U.S.C. § 20143. In that section, Congress directed the Secretary to prescribe final regulations requiring enhanced locomotive visibility measures "not later than December 31, 1997." 49 U.S.C. § 20143(e) (App. E). Hence, at the time that the District Court and the Sixth Circuit concluded that Springston's claims were preempted, (App. A,C), the Secretary still had not issued regulations covering Springston's state law tort claims. Consequently, Springston's state law tort claims should not have been preempted.

Because the Sixth Circuit's decision is squarely in conflict with the two decisions by the Supreme Court of Montana, as well as the history and purpose of the LBIA and FRSA, this Court is urged to take jurisdiction of this matter and articulate whether a state law claim for lack of locomotive conspicuity devices is preempted. There is a pressing

need for a clear statement of law on this issue.

Furthermore, this conflict is evident in other aspects of litigation involving railroad equipment, where a number of state courts have refused to preempt a plaintiff's state law claims. As will be shown, the thrust of these decisions is that a railroad is not necessarily free from negligence, even though it may have literally complied with safety statutes or rules, if the circumstances required it to do more. The Supreme Court of Arizona came to such a conclusion in DeElena v. Southern Pac. Co., 592 P.2d 759, 762 (Ariz. 1979). There, the decedent was killed when struck by a train at a crossing. The railroad sought to exonerate itself by arguing that it had complied with every applicable safety statute or rule, therefore any claims against it going beyond the safety statutes were preempted. The supreme court rejected the railroad's

argument, stating "whether a railroad is negligent in a particular manner, such as in failing to provide automatic crossing gates, is a question of fact for the jury."

Likewise, California rejects the notion that a railroad's mere compliance with various safety statutes preempts a plaintiff's state law tort claims. In Hogue v. Southern Pacific Co., 460 P.2d 965 (Cal. 1969), a railroad crossing incident in which a motorist was killed, the California Supreme Court held that statutory regulations "constitute only the minimum measure of care required by the railroad, and it is usually a matter for the jury to determine whether something more than the minimum was required under the evidence . . ." 460 P.2d at 968.

Illinois has held that a railroad's compliance with statutory regulations is not dispositive of the issue; the issue may be presented to a jury as to whether the railroad should have employed additional

safety measures. In the case of Rucker v. Norfolk & W. Ry. Co., 381 N.E.2d 715 (Ill. Ct. App. 1978), rev'd on other grounds 396 N.E.2d 534 (Ill. 1979), the plaintiff was killed by a defectively designed tank car that ruptured and exploded. The defendant railroad company argued that Congress had preempted any claims concerning tank car design and safety features based upon state law. The court of appeals rejected the railroad's argument, holding that the federal regulations did not "extend so far as to prohibit actions brought by injured persons against railroads or equipment manufacturers based upon a theory of strict liability in tort." Rucker, 381 N.E.2d at 721. The court added that an "individual's action for personal injuries based upon a defective design products liability theory does not run contrary to federal statutes dealing with railroad safety." Id. at 722.

Rucker was affirmed by the Supreme Court of Illinois, which held

> We do not believe that the presence of federal regulations on the subject precludes the imposition of tort liability according to state tort law standards more stringent than those contained in the federal regulations. We find no indication in the federal regulations that the preemption of state tort law was intended.

Rucker v. Norfolk & W. Ry., 369 N.E.2d 534, 537 (Ill. 1979). The court concluded that since the purpose of the regulations was to insure greater safety in railroad operations, the imposition of more stringent safety standards was not at all inconsistent with that purpose. Id.

Finally, the Court is referred to the decision of the Ohio Supreme Court in In re Miamisburg Train Derailment Litigation, 68 Ohio St. 3d 255, 626 N.E.2d 85 (1994). Miamisburg entailed a defectively designed

tank car which derailed and ruptured, releasing toxic fumes into a nearby community. The issue before the court was whether federal legislation preempted the plaintiffs' state law claims. The court reviewed the provisions of the FRSA and concluded that the federal regulations did not substantially subsume the subject matter of the plaintiffs' state law tort claims. The regulation in issue concerned tank cars manufactured after 1971. Because the subject tank car was built in 1966, the federal legislation did not apply. The Ohio Supreme Court concluded that the plaintiffs' claims were not preempted.

As can be seen then, there is a distinct conflict between the Sixth Circuit's decision in this case and the decisions of the Supreme Court of Montana. Furthermore, the Sixth Circuit's decision is inconsistent with the history and purpose of the FRSA and LBIA. Finally, numerous state courts have

refused to preempt a state law claim even where the railroad demonstrated compliance with federal regulations. In order to resolve this conflict, and in order to promote uniformity on the issue of whether state law claims for lack of railroad safety devices are preempted, this Court must take jurisdiction of this matter.

THE ISSUE WHETHER THE LBIA AND FRSA PREEMPT A PARTY'S STATE LAW TORT CLAIMS FOR LACK OF LOCOMOTIVE CONSPICUITY DEVICES IS AN IMPORTANT QUESTION WHICH SHOULD BE SETTLED BY THIS COURT

There are millions of railroad grade crossings in this country, with millions of motorists traversing those crossings every day. Unfortunately, thousands of train-car collisions occur every year, resulting in death and injury. Many of these collisions could have been avoided if the locomotives been equipped with conspicuity devices.

It is imperative that this Court avail itself of the opportunity to speak to the

issue of whether a state law tort claim for lack of locomotive conspicuity devices is preempted by federal law. The clear conflict between the Sixth Circuit's decision and the decisions of the Supreme Court of Montana is just one of many reasons for the Court to resolve this issue. A decision by this Court will also go a long way to reducing the conflict proliferating in many state courts on related aspects of railroad litigation.

CONCLUSION

For the reasons set forth above, Petitioner urges that this petition for writ of certiorari be granted.

Respectfully submitted,

JOHN D. LIBER
Counsel of Record
SPANGENBERG, SHIBLEY & LIBER
1900 E. 9th Street, Suite 2400
Cleveland, OH 44114-3400
(216) 696-3232

PATRICIA A. WALKER
RALPH E. JOCKE
WALKER & JOCKE
231 South Broadway
Medina, OH 44256-26017

Attorneys for Petitioner
Robert S. Springston

Table of Appendix Contents

6TH CIRCUIT FILINGS:

Opinion,
filed 11/19/97 ..... A1-A12

Order Denying Petition For *En Banc* Rehearing,
filed 1/22/98 ..... B1-B2

NORTHERN DISTRICT OF OHIO,
WESTERN DIVISION FILINGS:

Opinion [Judge Dowd],
filed 7/5/94 ..... C1-C26

Order [Judge Katz],
filed, 3/24/96 ..... D1-D6

STATUTES:

Locomotive Boiler Inspection Acts:

45 U.S.C. §§ 22 and 23 (repealed) E1
45 U.S.C. §§ 421 (repealed) E1
45 U.S.C. §§ 431(u) E3
45 U.S.C. §§ 434 (1992) (repealed) E5
49 U.S.C. §§ 20101, 20102 ..... E6
49 U.S.C. §§ 20106 ..... E7
49 U.S.C. §§ 20143 ..... E8
49 U.S.C. §§ 20301 ..... E11
49 U.S.C. §§ 20302 ..... E12

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

Opinion

6th Circuit Case Nº. 96-3571 and 96-3608
Filed November 19, 1997

Pages A-1 thru A-12

RECOMMENDED FOR FULL-TEXT PUBLICATION
Pursuant to Sixth Circuit Rule 24

ELECTRONIC CITATION: 1997 FED App. 0341P (6th Cir.)
File Name: 97a0341p.06

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

Robert S. Springston,	)	
Plaintiff-Appellant/	)	
Cross-Appellee,	)	
	)	**Nos. 96-3571/3608**
v.	)	
Consolidated Rail Corporation,	)	
Defendant-Appellee/	)	
Cross-Appellant,	)	
	)	
General Motors Corporation,	)	
Defendant-Appellee.	)	

Appeal from the United States District Court
for the Northern District of Ohio at Toledo.
No. 93-07233--David A. Katz, District Judge.

Argued: June 5, 1997
Decided and Filed: November 19, 1997

Before: **MARTIN**, Chief Judge; **RYAN** and
BATCHELDER, Circuit Judges.

COUNSEL

ARGUED: Dennis R. Lansdowne, SPANGENBERG, SHIBLEY & LIBER, Cleveland, Ohio, for Appellant. Philip E. Howes, VOGELGESANG, HOWES, LINDAMOOD & BRUNN, Canton, Ohio, Thomas J. Sweeney, ECKERT, SEAMANS, CHERIN & MELLOTT, Pittsburgh, Pennsylvania, for Appellees.

ON BRIEF: Dennis R. Lansdowne, Justin F. Madden, John D. Liber, SPANGENBERG, SHIBLEY & LIBER, Cleveland, Ohio, Patricia A. Walker, Ralph E. Jocke, WALKER & JOCKE, Medina, Ohio, for Appellant. Philip E. Howes, Thomas R. Himmelspach, VOGELGESANG, HOWES, LINDAMOOD & BRUNN, Canton, Ohio, Robert B. Duaane, Canton, Ohio, Thomas J. Sweeney, Joseph M. Ramirez, ECKERT, SEAMANS, CHERIN & MELLOTT, Pittsburgh, Pennsylvania, for Appellees. David M. Heilbron, McCUTCHEN, DOYLE, BROWN & ENERSEN, San Francisco, California, Jeffrey Robert White, Washington, D.C., Allen Schulman, Jr., ALLEN SCHULMAN & ASSOCIATES, Canton, Ohio, for Amici Curiae.

OPINION

ALICE M. BATCHELDER, Circuit Judge. Plaintiff appeals and defendant Consolidated Rail

Corporation ("Conrail") cross-appeals the judgment of the district court in this diversity action arising out of a collision between a Conrail train and a pick-up truck driven by plaintiff in northwest Ohio. For the reasons to follow, we AFFIRM the judgment of the district court.

I

On June 1, 1991, at approximately 11:30 p.m., while traveling east on Route 281 in rural northwest Ohio, Robert Springston drove his pick-up truck onto a Conrail main track, directly in the path of a northbound Conrail train. The resulting collision left Springston a quadriplegic.

The crossing at which this collision occurred was equipped with a crossbuck and an advance warning sign as required by law; it did not have lights or mechanical crossing gates. Springston had never traversed this crossing before and was not familiar with the area. Conrail's engineer testified that Springston had his dome light on and appeared to be looking at the seat or the floor next to him when he drove over the tracks. Springston does not deny this allegation and in fact indicates that he had been looking at a map on the seat next to him sometime prior to the collision.

Springston brought suit against Conrail, which owns the train and the track, and General Motors Corporation ("GM"), which manufactured the train. The district court granted summary judgment to the defendants on plaintiff's

claims of negligence based upon the lack of visual devices on the locomotive such as reflective tape, a strobe light, a ditch light, oscillating lights, and the color of the locomotive, finding that these claims were preempted by federal law. Subsequently, the court granted summary judgment to Conrail on plaintiff's punitive damages claim as well. The sole remaining claim, a claim against Conrail for negligence based on the adequacy of the warning devices installed at the crossing, went to trial, and the jury apportioned negligence 30% to Conrail and 70% to Springston. Springston appeals, asserting that the district court erred in granting summary judgment to GM, in granting partial summary judgment to Conrail, in the instructions to the jury, and in its evidentiary rulings. Defendant Conrail appeals a single evidentiary ruling.

II

A. FEDERAL PREEMPTION

The district court granted summary judgment to both defendants on plaintiff's claims of negligence based on the lack of extra-statutory warning signals on the train, holding that these claims were preempted by federal law. We review de novo the court's granting of summary judgment. *Harrow Products, Inc. v. Liberty Mut. Ins. Co.*, 64 F.3d 1015, 1019 (6th Cir. 1995).

Federal preemption of state law claims can be either express or implied. The district court inferred preemption

under the Boiler Inspection Act ("BIA").

> '[T]he scheme of federal regulation may be so pervasive as to make reasonable the inference that Congress left no room for the States to supplement it,' because 'the Act of Congress may touch a field in which the federal interest is so dominant that the federal system will be assumed to preclude enforcement of state laws on the subject,' or because 'the object sought to be obtained by federal law and the character of obligations imposed by it may reveal the same purpose.'

Fidelity Fed. Sav. & Loan Ass'n v. de la Cuesta, 458 U.S. 141, 153 (1982) (quoting *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947)). Where Congress intends to occupy a field, state law in that field is preempted. *Pacific Gas & Elec. Co. v. State Energy Resources Conservation and Dev. Comm'n*, 461 U.S. 190, 212-213 (1983).

When facing a question of implied preemption, a court must begin with the presumption that the state law is valid.

> "'It will not be presumed that a federal statute was intended to supersede the exercise of the power of the state unless there is a clear manifestation of intention to do so. The exercise of federal supremacy is not lightly to be presumed.'"

New York State Dept. of Soc. Servs. v. Dublino, 413 U.S. 405, 413 (1973) (citation omitted).

Plaintiff claims that GM was negligent in its design and manufacture of the train in question because it was not equipped with certain warning devices above and beyond those devices required by federal law, and that Conrail was negligent because it operated the train in that defective condition. Defendants counter by arguing that state law tort claims based upon the need for such extra-statutory devices are preempted by federal law. The defendants have the better argument.

In 1893, Congress enacted the first of multiple statutes collectively known as the Safety Appliance Acts ("SAA"). *Baltimore and O.R.R. v. Jackson*, 353 U.S. 325, 338 (1957) (Burton, J., dissenting). A related act, the BIA, was first enacted in 1911. *Marshall v. Burlington Northern, Inc.*, 720 F.2d 1149, 1152 (9th Cir. 1983). Through these acts, Congress conferred on the Interstate Commerce Commission ("ICC") full authority over "the entire locomotive and tender and all parts and appurtenances thereof." *Napier v. Atlantic Coast Line R.R.*, 272 U.S. 605, 608 (1926) (quoting BIA amendment of 1915). That power was transferred from the ICC to the Department of Transportation in 1966 by the Department of Transportation Act. Marshall, 720 F.2d at 1152.

At the time plaintiff filed his complaint, these acts were codified within 45 U.S.C. ^U^U 1-43. As of July 5,

1994, Congress repealed 45 U.S.C. ^U^U 1-43. Pub. L. No. 103-272, ^U 7(b), 108 Stat. 1379. The Acts' provisions were transferred and re-codified at 49 U.S.C. ^U^U 20301- 20306 and 20701-20903. Pub. L. No. 103-272, ^U 1(e), 108 Stat. 881-883 and 885-887. *See Moses v. Union Pacific R.R.*, 64 F.3d 413, 418 (8th Cir. 1995).

In Napier, the Court considered whether Congress had intended to occupy the field of locomotive equipment to the exclusion of state authority when it enacted the BIA. The Napier Court held that the intention was to occupy the field, preempting state law claims. Napier, 272 U.S. at 613.

In Marshall, 720 F.2d 1149, the Ninth Circuit considered a claim identical to that of Springston: whether the railroad could be liable for a grade crossing collision under a claim alleging common-law negligence for failing to install different headlights on a locomotive. The Marshall court held that the common law was preempted under the BIA, stating:

> [W]e hold that under the [BIA] the state may not impose liability for failure to install a part or attachment of a locomotive if it is 'within the scope of the authority of the [Secretary]' to prescribe the same part or attachment. It is within the scope of the Secretary's authority to prescribe strobe or

> oscillating lights for locomotives, and any state regulation is therefore preempted

Id. at 1152 (quoting Napier, 272 U.S. at 611). *See also Eldridge v. Missouri P.R.R.*, 832 F. Supp. 328 (E.D. Okla. 1993) (granting partial summary judgment on plaintiff's claim that the locomotive involved in the crossing collision was equipped with inadequate warnings, holding that the claim was preempted under the BIA).

Contrary to plaintiff's argument, the preemptive effect of the BIA on state regulation of locomotive equipment was not affected or modified by the Federal Railroad Safety Act ("FRSA") which was enacted in 1970. The Marshall court addressed this issue, holding that the FRSA "does not subsume, replace, or recodify any acts. The logical inference from this structure is that Congress intended to leave unchanged the force and effect of existing federal regulatory statutes." *Id.* at 1153. The Marshall court noted that the objective of the FRSA, to achieve national uniformity of railroad regulation, 49 U.S.C. ^U 20106, would be undermined if the FRSA were read to repeal preemption under the BIA. *Id.* Federal law preempts plaintiff's claims based upon the need for extra-statutory warning devices on the train. The district court was correct in granting summary judgment for defendants on this issue.

B. PUNITIVE DAMAGES

The district court granted Conrail's motion for summary judgment on the issue of punitive damages. The court's granting of summary judgment is reviewed de novo. *Harrow Products, Inc. v. Liberty Mut. Ins. Co.*, 64 F.3d 1015, 1019 (6th Cir. 1995).

In Ohio, punitive damages are available in civil tort actions upon a finding of actual malice. *Edmondson v. Steelman*, 622 N.E.2d 661, 663 (Ohio App. 1992). The Ohio Supreme Court in *Preston v. Murty*, 512 N.E.2d 1174 (Ohio 1987), held that actual malice may be demonstrated by showing (1) that state of mind under which a person's conduct is characterized by hatred, ill-will, or a spirit of revenge, or (2) a conscious disregard for the rights and safety of other persons that has a great probability of causing substantial harm. The Court in Preston discussed the policy behind punitive damages as follows:

> The policy for awarding punitive damages in Ohio '* * * has been recognized * * * as that of punishing the offending party and setting him up as an example to others that they might be deterred from similar conduct.' Since punitive damages are assessed for punishment and not compensation, a positive element of conscious wrongdoing is always required. This element has been termed conscious,

> deliberate or intentional. It requires the party to possess knowledge of the harm that might be caused by his behavior.

Id. at 1176 (citation omitted).

When considering punitive damages, "misconduct greater than mere negligence is required." *Calmes v. Goodyear Tire & Rubber Co.*, 575 N.E.2d 416, 419 (Ohio 1991).

The concept requires a finding that the probability of harm occurring is great and that the harm will be substantial. A possibility or even probability will not be enough as that requirement would place the act in the realm of negligence. A requirement of substantial harm would also better reflect the element of outrage required to find actual malice. Preston, 512 N.E.2d at 1176. Nothing in the record supports plaintiff's argument that the issue of punitive damages should have gone to the jury. The district court was correct in granting summary judgment for the defendants on this ground.

C. JURY INSTRUCTION REGARDING THE DUTY OF CARE

Plaintiff argues that the district court gave the wrong instruction regarding the duty of care owed to plaintiff by the defendant railroad. Plaintiff's argument involves interpretation of Ohio law, specifically the standard of care as articulated in *Matkovich v. Penn Central Transp. Co.*, 431 N.E.2d 652 (Ohio 1982) and in *Hood v. New York, C.*

& St. L.R.R., 144 N.E.2d 104 (Ohio 1957). We need not address plaintiff's argument regarding the correct jury instruction because this issue was mooted by the outcome of the case, as evidenced by the jury's response to the interrogatory addressing the negligence of Conrail. *Shepherd v. Puzankas*, 355 F.2d 863, 865 (6th Cir. 1966) (argument of error as to jury instruction mooted by ultimate response of jury). Interrogatory number two asked "[o]f what did the negligence of Consolidated Rail Corporation consist?" The jury responded: "Absence of active warning systems based on traffic flow for St Rt 281 crossing." This response makes it evident that the jury focused on the actions of the railroad and found the railroad negligent in failing to provide extra-statutory warnings at the intersection. The plaintiff, having prevailed on this issue, can show no prejudice resulting from the jury instruction.[1]

D. CLAIMS OF EVIDENTIARY ERROR

The remaining alleged errors, those of both plaintiff and defendant, involve evidentiary matters. "A district

---

[1] In any event, we note that this court has recently held that Hood and Matkovich are not in conflict, but rather that where the crossing is "extra-hazardous," the railroad's duty to use ordinary care to protect the safety of motorists may require the installation of extra-statutory warning devices. Hostetler v. Consolidated Rail Corp., 123 F.3d 387 (6th Cir. 1997).

court's evidentiary determinations are subject to an abuse of discretion standard of review." *Hancock v. Dodson*, 958 F.2d 1367, 1371 (6th Cir. 1992). Having thoroughly reviewed the record and having heard oral argument, we now hold that the district court did not abuse its discretion as to any of the evidentiary rulings now claimed as error. The district court is affirmed as to all remaining issues on appeal.

The orders of the district court are **AFFIRMED**.

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

Order Denying Petition
For Rehearing *En Banc*

6th Circuit Case Nº. 96-3571 and 96-3608
Filed January 22, 1998

Pages B-1 thru B-2

Nos. 96-3571 and 96-3608

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

ROBERT S. SPRINGSTON	)	
Plaintiff-Appellant/Cross Appellee,	)	**ORDER**
	)	**DENYING**
v.	)	**PETITION**
	)	**FOR REHEARING**
CONSOLIDATED RAIL CORPORATION;	)	
Defendant-Appellee/Cross-Appellant,	)	
GENERAL MOTORS CORPORATION,	)	**Filed**
Defendant-Appellee.	)	**Jan. 22, 1998**
	)	**Leonard Green,**
	)	**Clerk**

Before: **MARTIN**, Chief Judge; **RYAN**, and **Batchelder**, Circuit Judges.

The court having received a petition for rehearing en banc, and thepetition having been circulated not only to the originalpanel members but also to all other active judges of this court, and no judge of this court having requested a vote on the suggestions for rehearing en banc, the peitition for rehearing has been referred to the original panel.

The panel has further reviewed the petition for rehearing and concludes that the issues raised in the petition

were fully considered upon the original submittsion and decision of the case. Accordingly, the petition is denied.

ENTERED BY ORDER OF THE COURT

/s/ Leonard Green, Clerk

APPENDIX C

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO,
WESTERN DIVISION

MEMORANDUM OPINION
by Judge Dowd

District Court Case Nº. 3:93-CV-7233
Filed July 5, 1994

Pages C-1 thru C-26

Robert S. SPRINGSTON,
Plaintiff,

v.

CONSOLIDATED RAIL CORP., et al., ***Defendants.***

No.3:93 CV 7233.

United States District Court,
N.D. Ohio,
Western Division.

July 5, 1994.

Motorist injured in a collision with locomotive at grade crossing brought negligence and products liability action against railroad and locomotive manufacturer. On railroad's and manufacturer's motions for summary judgment, the District Court, Dowd, J., held that: (1) Boiler Inspection Act preempted motorist's state law claims, and (2) railroad was entitled to summary judgment on motorist's claim of defective locomotive.

Granted.

1. Federal Civil Procedure 247O.4

Summary judgment is appropriate where there are no genuine issues of material fact and moving party is entitled to judgment as matter of law. Fed.Rules Civ.Proc. Rule 56, 28 U.S.C.A.

2. **Federal Civil Procedure 2544**

Favorable treatment of facts and inferences for party opposing motion for summary judgment does not relieve that party of its responsibility to go beyond pleadings to oppose otherwise properly supported motion for summary judgment. Fed.Rules Civ.Proc. Rule 56, 28 U.S.C.A.

3. **Federal Civil Procedure 2544**

Once moving party satisfies its burden to show absence of evidence to support non-moving party's case, party in opposition to summary judgment motion may not rest upon mere allegations or denials of its pleading, but must set forth specific facts showing that there is genuine issue for trial. Fed. Rules Civ. Proc. Rule 56, 28 U.S.C.A.

4. **Federal Civil Procedure 2546**

General averments or conclusional allegations of affidavit do not create specific fact disputes for summary judgment purposes. Fed. Rules Civ. Proc. Rule 56(e), 28 U.S.C.A.

5. **States 18.3**

Doctrine of preemption, derived from supremacy clause of Federal Constitution, is designed to prevent states from impinging too much on federal law and policy. U.S.C.A. Const. Art. 6, cl. 2.

6. **States 18.7**

Where Congress intends to occupy field, state law in that field is preempted. U.S.C.A. Const. Art. 6, cl. 2.

7. **States 18.3**

When facing question of implied preemption, court must begin with presumption that state law is valid.

8. **Products Liability 62**
Railroads 312.1
States 18.21, 18.65

Boiler Inspection Act preempted motorist's state common law and products liability causes of action against railroad and locomotive manufacturer arising from train-car collision at railway crossing; allowing state tort claims to stand would result in requirements of reflective material, and oscillating, strobe, or ditch lights on locomotives, which would be additional to federal requirements, comprising nationally uniform standard of regulating locomotive equipment. Ohio R.C. §§ 1302.27, 1302.28, 2307.75(A), 2307.77; Boiler Inspection Act, 45 U.S.C. (1988 Ed.) § 22 et seq.; Federal Railroad Safety and Hazardous Materials Transportation Control Act of 1970, § 101 et seq., 45 U.S.C. (1988 Ed.) § 421 et seq.

9. Federal Civil Procedure 2485

Summary judgment was appropriate on motorist's claim that locomotive involved in collision with his automobile was defective, where railroad argued it satisfied its duty as to locomotive by meeting safety standards established by the Federal Railroad Safety Act in the Boiler Inspection Act, and motorist did not respond to railroad's request for summary judgment. Fed. Rules Civ. Proc. Rule 56(e), 28 U.S.C.A.; boiler inspection Act, 45 U.S.C. (1988 Ed.) § 22 et seq.; Federal Railroad Safety and Hazardous Materials Transportation Control Act of 1970, § 101 et seq., 45 U.S.C. (1988 Ed.) § 421 et seq.

10. Federal Civil Procedure 2544

Nonmoving party bears responsibility to demonstrate that summary judgment is inappropriate. Fed. Rules Civ. Proc. Rule 56, 28 U.S.CA.

John Douglas Liber, Dennis R. Lansdowne, Spangenherg, Shibley, Traci, Lancione & Liber, Cleveland, OH, Ralph E. Jocke, Patricia Ann Walker, Walker & Jocke, Medina, OH, for plaintiff.

Richard S. Milligan, Philip E. Howes, Thomas R. Himmelspach, Robert B. Daane, Vogelgesang, Howes, Lindamood & Brunn, Canton, OH, for Consolidated Rail Corp.

Thomas J. Sweeney, Pietragallo, Bosick & Gordon, Pittsburgh, PA for General Motors Corp.

David J. Hanna, Buckingham, Doolittle & Burroughs, Akron, OH, for David J. Hanna.

MEMORANDUM OPINION

DOWD, District Judge.

This case is before the Court on the motion of defendant General Motors Corporation, Electro-Motive Division ("General Motors") summary judgment, and the motion of defendant Consolidated Rail Corporation ("Conrail") for partial summary judgment. Plaintiff opposes both motions, and both Conrail and General Motors have filed reply briefs. This Court has jurisdiction pursuant to 28 U.S.C. § 1332.

I. FACTUAL BACKGROUND

This case arises out of a collision between a car and a train at a railroad crossing in northwestern Ohio, south of Bowling Green. The driver of the car was plaintiff Robert Springston, who was en route from the University of Southern Illinois to Crotch Island, Maine. The collision occurred at approximately 11:30 p.m. when Conrail's train was traveling northbound on the single, main track, and Springston was traveling east on Route 281. Springston's

pickup truck was struck when he drove in front of the train. Springston was rendered a quadriplegic.

Springston brings this action against Conrail, alleging, in part, that Conrail caused the collision by negligently falling to install different warning equipment on the locomotive.[1] Specifically, plaintiff alleges that the lead locomotive was not equipped with the audible warning devices or the visual warning devices necessary to warn of the trains presence, and was not painted so as to warn of the train's presence. Plaintiff also alleged that Conrail caused the collision by operating the train with a "defective" locomotive.

Springston also brings suit against General Motors, the manufacturer of the locomotive at issue, alleging again that the locomotive was defective. Springston presents his claims against General Motors pursuant to Ohio Revised Code §§ 2307.75(A) (product defective in design or formulation), 2307.77 (products defective due to non-conformance with manufacturers' representation), 1302.27 (implied warranty, merchantability; usage of trade), and

---

[1] Plaintiff also alleges in Count II of his Complaint, that Conrail is liable for plaintiffs injuries because it knew of ultrahazardous conditions at the crossing where the accident took place, but failed to take steps to make the crossing safer. This Count is not at issue in the summary judgment motions at bar.

1302.28 (implied warranty; fitness for a particular purpose). Plaintiff also alleges a claim for punitive damages against General Motors.

Both Conrail and General Motors have moved for summary judgment. Although the two defendants filed separate motions for summary judgment, both defendants present the same issue: are plaintiffs claims that the locomotive should have been equipped with reflective materials and strobe, ditch and/or oscillating lights preempted by the Boiler Inspection Act ("BIA"), 45 U.S.C. § 22, *et seq.*, or the Federal Railroad Safety Act ("FRSA"), 45 U.S.C. § 421, *et seq.*? Conrail also asks for summary judgment on plaintiffs claim that the locomotive at issue was defective.

II. SUMMARY JUDGMENT STANDARD

[1,2] Summary judgment is appropriate where there are no genuine issues of material fact and the moving party is entitled to judgment as a matter of law. Fed.R.Civ.P.56 When considering a motion for summary judgment, "the inferences to be drawn from the underling facts contained in [affidavits, pleadings, depositions, answers to interrogatories, and admissions] must be viewed in the light most favorable to the party opposing the motion." *U.S. v. Diebold*, 369 U.S. 654, 655, 82 5.Ct. 993, 993, 8 L.Ed.2d 176 (1962). *See e.g., United States v. Hodges X-Ray, Inc.*, 759 F.2d 557, 562 (6th Cfr.1985) and cases cited therein.

The Court's favorable treatment of facts and inferences, however, does not relieve the nonmoving party of his responsibility "to go beyond the pleadings" to oppose an otherwise properly supported motion for summary judgment under Rule 56(e). *See Celotex Corp. V. Catrett*, 477 U.S. 317, 324, 106 S.Ct. 2548, 2553, 91 L.Ed.2d 265 (1986).

[3,4] Once the moving party satisfies his burden to show an absence of evidence to support the nonmoving party's case, *Celotex Corp. v. Catrett*, 477 U.S. at 323, 106 S.Ct. at 2552, the party in opposition "may not rest upon mere allegation or denials of his pleading, but must set forth specific facts showing that there is a genuine issue for trial." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 256,106 S.Ct. 2505, 2514, 91 L.Ed.2d 202 (1986). Although the showing required of the nonmoving party by Rule 56 does not go so far as to require that all opposition evidence be in a form admissible at trial, the rule does require the nonmoving party who has the burden of proof at trial to oppose a proper summary judgment motion "by any of the kinds of evidentiary material listed in Rule 56(c), except the mere pleadings them-selves...." *Celotex Corp. v. Catrett*, 477 U.S. at 324, 106 S.Ct. at 2553. General averments or conclusional allegations of an affidavit, however, do not create specific fact disputes for summary judgment purposes. *See Lujan v. National Wildlife Federation*, 497 U.S. 871, 888-899, 110 S.Ct. 3177, 3188-899, 111 L.Ed.2d 695 (1990). Furthermore, unsworn statements and affidavits

composed of hearsay and nonexpert opinion evidence, "do not satisfy Rule 56(e) and must be disregarded." *See Dole v. Elliott Travel & Tours, Inc.*, 942 F.2d 962, 968-69 (6th Cir.1991) (quoting *State Mut. Life Assurance Co. of Am. V. Deer Greek Park*, 612 F.2d 259, 264 (6th Cir.1979) and citing *Adickes V. S.H. Kress & Co.*, 398 U.S. 144, 158 n. 17, 90 S.Ct. 1598, 1609 n. 17, 26 L.Ed.2d 142 (1970)). Nor may a party "create a factual issue by filing an affidavit, after a motion for summary judgment has been made, which contradicts [] earlier deposition testimony." *Reid v. Sears, Roebuck & Co.*, 790 F.2d 453, 460 (6th Cir. 1986) (citing *Biechele v. Cedar Point, Inc.*, 747 F.2d 209, 215 (6th Cir. 1984)).

On a motion for summary judgment, the Court will consider "[o]nly disputes over facts that might affect the outcome of the suit under the governing law." *Anderson v. Liberty Lobby*, 477 U.S. at 248, 106 S.Ct. at 2510. Nonmaterial facts will not he considered. Neither will the judge attempt to weigh the material evidence or determine its truth. *Anderson v. Liberty Lobby*, 477 U.S. at 249, 106 S.Ct. at 2510. The judge's sole function will be to determine whether there is a genuine issue for trial such that "there is sufficient evidence favoring the nonmoving party for a jury to return a verdict for that party." *Id.* (citations omitted).

Where the non-moving party "has failed to make a sufficient showing on an essential element of her case with

respect to which she has the burden of proof," summary judgment is appropriate. *Celotex Corp. v. Catrett*, 477 U.S. at 323, 106 S.Ct. at 2552 (equating the standard for a directed verdict under Rule 50(a) with the summary judgment standard of Rule 56). If the evidence is "merely colorable," or is "not significantly probative," the Court may decide the legal issue and grant summary judgment. *Anderson v. Liberty Lobby*, 477 U.S. at 249, 106 S.Ct. at 2510-11 (citing *Dombrouwski v. Eastland*, 387 U.S. 82, 87 S.Ct. 1425, 18 L.Ed.2d 577 (1967) (*per curiam*) and *First Nat'l Bank of Ariz. v. Cities Serv. Co.*, 391 U.S. 253, 290, 88 S.Ct. 1575, 1593, 20 L.Ed.2d 569 (1968)). "'The mere existence of a scintilla of evidence in support of the plaintiffs position will be insufficient; there must be evidence on which the jury could reasonably find for the plaintiff."' *Street v. J.C. Bradford & Co.*, 886 F.2d 1472, 1477 (6th Cir.1989) (quoting *Anderson v. Liberty Lobby*, 477 U.S. at 252, 106 S.Ct. at 2512).

In sum, "[t]he inquiry performed is the threshold inquiry of determining whether there is the need for a trial-whether, in other words, there are any genuine factual issues that properly can be resolved only by a finder of fact because they may reasonably be resolved in favor of either party." *Anderson v. Liberty Lobby*, 477 U.S. at 250, 106 S.Ct. at 2511.

III. LAW AND DISCUSSION

A. The Preemption Doctrine

[5] Article VI, the Supremacy Clause of the United States Constitution, declares:

> This Constitution, and the laws of the United States which shall be made in Pursuant thereof, and all Treaties made, or which shall be made, under the Authority of the United States, shall he the supreme law of the Land
>
> ...

It is from this Supremacy Clause that the doctrine of preemption is derived. It is designed to prevent the States from impinging too much on federal law and policy. *Louisiana Public Service Comm'n v. FCC*, 476 U.S. 355, 368, 106 S.Ct. 1890, 1898, 90 L.Ed.2d 369 (1986).

[6] The Supreme Court has laid the path to be followed in a preemption analysis. Congress may, of course, expressly state that state law is preempted. If no such statement is made, however, preemption may he inferred because

> "the scheme of federal regulation may be so pervasive as to make reasonable the inference that Congress left no room for the States to supplement it," because "the Act of Congress may touch a field in which the federal interest is so dominant that the federal system will be assumed to preclude

enforcement of state laws on the subject," or because " the object sought to be obtained by federal law and the character of obligations imposed by it may reveal the same purpose."

Fidelity Fed'l Savings & Loan Ass'n v. & de la Cuesta, 458 U.S. 141, 153, 102 S.Ct. 3014, 3022, 73 L.Ed.2d 664 (1982) (quoting *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230, 67 S.Ct. 1146, 1152, 91 L.Ed. 1447 (1947)). Where Congress intends to occupy a field, state law in that field is preempted. *Pacific Gas & Electric Co. v. State Energy Resources Conservation and Development Comm'n*, 461 U.S. 190, 212-213, 103 S.Ct. 1713, 1726-1727, 75 L.Ed.2d 752 (1983).

[7] When facing a question of implied preemption, a court must begin with the presumption that the state law is valid. "It will not be presumed that a federal statue was intended to supersede the exercise of the power of the state unless there is a clear manifestation of intention to do so. The exercise of federal supremacy is not lightly to be presumed." *New York State Dept. of Social Services v. Dublino*, 413 U.S. 405, 93 S.Ct. 2507, 37 L.Ed.2d 688 (1973) (quoting *Schwartz v. Texas*, 344 U.S. 199, 202-203, 73 S.Ct. 232, 235, 97 L.Ed. 231(1952)).

[8] Defendants argue that the BIA occupies the field of locomotive equipment regulation, and therefore preempts plaintiff's state law causes of action. The BIA was enacted in 1911, and conferred on the Interstate Commerce

Commission ("ICC") (now the Secretary of Transportation and the Federal Railroad Commission ("FRA")) full authority over "the entire locomotive and tender and all parts and appurtenances thereof." *Napier v. Atlantic C.L.R. Co.*, 272 U.S. 605, 608, 47 S.Ct. 207, 208, 71 L.Ed. 432 (1926) (quoting BIA amendment of 1915).

The BIA, 45 U.S.C. § 23, provides:

> It shall be unlawful for any railroad to use or permit to be used on its line any locomotive unless said locomotive, its boiler, tender, and all parts and appurtenances thereof are in proper condition and safe to operate in the service to which the same are put, that the same may be employed in the active service of such railroad without unnecessary peril to life or limb, and unless said locomotive, its boiler, tender, and all parts and appurtenances thereof have been inspected from time to time in accordance with the provisions of sections 22 to 29 and 31 to 34 of this title and are able to withstand such test or tests as may be prescribed in the rules and regulations hereinafter provided for.

In *Napier*, the Court considered whether Congress had intended to occupy the field of locomotive equipment to the exclusion of state authority when it enacted the BIA. In that case, the railroad sought to enjoin enforcement of a

Georgia statute requiring locomotives to have automatic fire box doors, and to enjoin enforcement of a Wisconsin statute requiring locomotive cabs to be equipped with a cab curtain. The Court concluded that the BIA gave the ICC full authority over "the design, the construction and the material of every part of the locomotive and tender and of all the appurtenances," and held that Congress had intended the BIA to occupy the field. The Court held that the state fire door and cab curtain laws were preempted under the BIA, even though the ICC had not issued any regulations regarding those matters. The Court opined:

> The fact that the commission has not seen fit to exercise its authority to the full extent conferred, has no bearing upon the construction of the act delegating the power. We held that state legislation is precluded, because the Boiler Inspection Act, as we construe it, was intended to occupy the field.

Id. at 613, 47 S.Ct. at 210. The Court held that locomotive cab curtains and automatic fire doors were "in their nature within the scope of authority delegated to the commission," *Id.* at 611, 47 S.Ct. at 209, and therefore that the state statutes were preempted.

Where the federal government has occupied a field, "the test of preemption is whether 'the matter on which the State asserts the right to act is in any way regulated by the Federal Act.'" *Pacific Gas & Electric*, 461 U.S. at 212-

213, 103 S.Ct. at 1726-1727 (citations omitted). Thus, defendants argue that Congress has provided for federal authority to occupy the field of locomotive equipment, and any state regulation on the subject of locomotive equipment is preempted.

In *Marshall v. Burlington Northern, Inc.*, 720 F.2d 1149 (9th Cir.1983), the Court considered a claim identical to that of Springston: whether the railroad could be liable for a grade crossing collision under a claim alleging common law negligence for failing to install different headlights on a locomotive. The *Marshall* court held that the common law was preempted under the BIA, stating:

> [W]e hold that under the [BIA] the state may not impose liability for failure to install a part or attachment of a locomotive if it is "within the scope of the authority of the [Secretary)" to prescribe the same part or attachment.... It is within the scope of the Secretary's authority to prescribe strobe or oscillating lights for locomotives, and any state regulation is therefore preempted.

Id. at 1152. See also *Eldridge v. Missouri Pacific Railroad*, 832 F.Supp. 328 (E.D.Okla. 1993) (court granted partial summary judgment on plaintiff's claim that the locomotive involved in the crossing collision was equipped with inadequate warnings, stating that the claim was preempted under the BIA).

Defendants further argue that the preemptive effect of the BIA on state regulation of locomotive equipment was not affected or modified by the FRSA, which was enacted in 1970. The *Marshall* court addressed this issue, stating that the FRSA conferred upon the Secretary the authority to adopt regulations supplementing provisions of law and regulations that were in effect prior to the enactment of the FRSA. "It does not subsume, replace, or recodify any acts. The logical inference from this structure is that Congress intended to leave unchanged the force and effect of existing federal regulatory statutes." *Id.* at 1153. The *Marshall* court noted that the objective of the FRSA to achieve national uniformity of railroad regulation, 45 U.S.C. § 434, would be undermined if the FRSA were read to repeal preemption under the BIA. *Id.*

Thus, defendants argue that the BIA preempts plaintiff's state law claims. Plaintiffs cannot, therefore, impose on defendants any common law duty to install different equipment on its locomotives, and summary judgment is warranted.

Plaintiff argues that the BIA does not apply in this case. Plaintiff asserts that the BIA was passed in response to dangers of railroading as an occupation, and that its purpose was to protect railroad employees by requiring railroad companies to provide safe equipment for their employees to work with. *See, e.g., Baltimore & Ohio R. Co. v. Groeger*, 266 U.S. 521, 45 S.Ct. 169, 69 L.Ed. 419

(1925); *Gowins v. Pennsylvania R.R. Co.*, 299 F.2d 431, 434 (6th Cir. 1962), *cert. denied*, 371 U.S. 824, 83 S.Ct. 44, 9 L.Ed.2d 64 (1962).

As further support for his argument, plaintiff points out that under the BIA, an injured railroad employee does not have a cause of action. Instead, an action for violation of the BIA is prosecuted as an action under the Federal Employers' Liability Act ("FELA"), 45 U.S.A. § 51(1988). Therefore, only railroad employees--not bystanders--can bring a cause of action for a violation of the BIA. Thus, plaintiff contends that the structure of the BIA indicates that it was enacted solely to protect railroad employees, and has no effect on bystander claims.

Plaintiff argues that it is the FRSA, not the BIA, that addresses the problem of bystander safety. Plaintiff cites the legislative history of the FRSA in support of the argument that although earlier enactments like the BIA had been effective and would be continued without change, "they [met] only certain and special types of railroad safety hazards." H.R.CONF.REP. NO. 91-1191, 91st Cong., 2nd Sess. reprinted in 1970 U.S. Code Cong. & Admin. News 4104. "These and other rail safety statutes have been reasonably effective in their respective areas. They were enacted to protect employees against particular hazards and the enforcement of their provisions over the years has saved lives." *Id.* However, in light of the number of crossing collisions, derailments, and spills, the public at large needed

to be protected with federal legislation, thus warranting the enactment of the FRSA. *Id.*

Plaintiff does not offer any case law as support for his assertion that the BIA does not preempt his state law claims. Plaintiff argues that the *Marshall* case was wrongly decided and should be disregarded. Specifically, plaintiff argues that the *Marshall* court overlooked the fact that Napier involved railroad employee safety rather than by-stander safety. Further, plaintiff claims that the *Marshall* case is distinguishable from the case at hand because it was decided before the 1992 amendments, codified at 45 U.S.C. § 431(1993), to the FRSA which authorized the Secretary of Transportation to initiate proceedings to address the utility of locomotive conspicuity devices.[2] According to

---

[2] (u) Locomotive Conspicuity
(1) The Secretary shall conduct a review of the Department of Transportation's rules with respect to locomotive conspicuity research no later than December 31, 1993. As part of this review, the Secretary shall collect relevant data from operational experience by railroads having enhanced conspicuity measures in service.
(2) Not later than December 31, 1992, the Secretary shall issue interim regulations identifying ditch lights, crossing lights, strobe lights, and oscillating lights as interim locomotive conspicuity measures, and authorizing and encouraging installation and use

plaintiff, these amendments evidence the fact that Congress clearly viewed locomotive conspicuity as a matter to be regulated under the FRSA.

In short, plaintiff argues that Congress has consistently referred to the BIA as a statute for the protection of railroad employees rather than bystanders, and because the intent of Congress is critical in a preemption determination, the plaintiff's common law and products liability claims are not preempted by the BIA.

Plaintiff's argument is not well-taken. This Court

> of such measures....
> (3) Not later than June 30.1994, the Secretary shall initiate a rulemaking proceeding to issue final regulations requiring substantially enhanced locomotive conspicuity measure. In such rulemaking proceeding, the Secretary shall consider, at a minimum--
> (A) revisions to the locomotive headlight standard, including standards for placement arid intensity;
> (B) requiring use of reflective materials to enhance locomotive conspicuity;
> (C) requiring use of additional alerting lights (including ditch, crossing, strobe, and oscillating lights);
> (D) requiring use of auxiliary lights to enhance locomotive conspicuity when viewed from the side;
> (E) the effect of any enhanced conspicuity measures on the vision, health and safety of train crew members; ...

45 U.S.C. § 431(u).

agrees with the *Marshall* court that the common law was preempted under the BIA. It is within the scope of the Secretary's authority to prescribe reflective materials or strobe, ditch or oscillating lights for locomotives, and any state regulation is therefore preempted.

Plaintiff's argument is not well-taken. The Supreme Court, in *Napier*, specifically described the BIA as "preemptive of any state or local regulation on the same subject." *Napier* 272 U.S. at 612-613, 47 S.Ct. at 210. "The power delegated to the [agency] ... extends to the design, the construction and the material of every part of the locomotive and tender and of all appurtenances." *Id.* at 611, 47 S.Ct. at 209. It is irrefutable that reflective materials and oscillating, strobe and ditch lights are parts of appurtenances of the locomotive.

Moreover, the very language of the *Napier* opinion refutes plaintiff's argument that because the purpose of the BIA was to protect railroad employees rather than by-standers, plaintiff's state law tort claims are not preempted. The *Napier* Court stated:

> The argument mainly urged by the states, in support of the claim that Congress has not occupied the entire field, is that the federal and the state laws are aimed at distinct and different evils; that the federal regulation endeavors solely to prevent accidental injury in the operation of trains, whereas the state

> regulation endeavors to prevent sickness and disease due to excessive and unnecessary exposure; and that whether Congress has entered a field must be determined by the object sought through the legislation, rather than the physical elements affected by it. Did Congress intend that there might still be state regulation of locomotives, if the measure was directed primarily to the promotion of health and comfort and affected safety, if at all, only incidentally?

Napier, 272 U.S. at 612, 47 S.Ct. at 209-210. The Court found that the state statutes at issue and the federal regulations were directed at the same objective--the equipment of locomotives. It did not matter that the state statutes were directed to a different purpose; rather, what mattered was that the state statutes sought to regulate equipment on the locomotive. The Court opined that "[b]ecause the standard set by the Commission must prevail, requirements by the states are precluded, . however commendable or however different their purpose." *Id.* at 613, 47 S.Ct. at 210.

Thus, it is not the purpose of locomotive requirements that is important.[3] The statutes at issue in

---

[3] The Court notes that, although the BIA was clearly enacted for the primary purpose of protecting railroad

Napier could not be upheld because they placed additional requirements on locomotives. The Court deemed it irrelevant that the requirements were aimed at a different purpose than was the BIA. Similarly, in the case at bar, to allow plaintiff's state tort claims to stand would result in requirements of reflective material, oscillating, strobe and/or ditch lights on locomotives. Such lights are additional requirements on locomotives, even if they are aimed at a different evil than are headlights. As the *Napier* Court found, the BIA is preemptive of any state or local regulation on the same subject. Accordingly, pursuant to the reasoning set forth in *Napier*; plaintiff's state law negligence and product liability causes of action are preempted.

Further, this Court notes that plaintiff ignores the effect on the regulation of railroads that the adoption of his argument would have. It is clear that Congress intended to provide a nationally uniform standard of regulating locomotive equipment. If each state is permitted to make its own decisions with respect to such items as reflective materials, oscillating, strobe and ditch lights, such goal would be compromised.

---

workers, it is also true that the BIA was also enacted to promote the safety of passengers and the public generally. *Brown v. Chicago, R.I & P.R. Co.*, 108 F.Supp. 164 (N.D.Iowa 1952) (citation omitted).

Conrail also points out, in refuting plaintiff's arguments, that, in response to 45 U.S.C. § 431(u), directing the Secretary to issue interim regulations regarding addition-a' locomotive lights, the FRA, at 58 Fed.Reg. 6899-649644 (May 13, 1994), issued 49 C.F.R. § 229.123. The authority for that section is listed in part as "45 U.S.C. § 22-23, as amended; 45 U.S.C. 431, 438 as amended". 45 U.S.C. § 22-33 is the BIA. If, as plaintiff urges, locomotive conspicuity is a matter that relates solely to bystander safety and is therefore unrelated to the BIA, the FRA would not have cited that act as the issuing authority.

In short, this Court is not persuaded by Springston's arguments regarding the BIA, and finds that plaintiffs state common law and products liability causes of action are indeed preempted. General Motors' motion for summary judgment and Conrail's motion for partial summary judgment on the issue of preemption will therefore be granted.

B. Claim of A Defective Locomotive

[9] Conrail also asks for summary judgment on plaintiffs claim that the locomotive was defective, stating that to recover on such a claim, plaintiff will have to establish that Conrail breached a duty it owed to plaintiff and that the breach was the proximate cause of the collision. *Moncol v. Board of Educ.*, 55 Ohio State 2d 72, 9 O.O.3d 75, 378 N.E.2d 155 (1978). Conrail argues that

its duty with respect to the locomotive was to meet the safety standards established by the FRA in the BIA Conrail argues that the evidence before the Court shows that it did meet those requirements. Plaintiff does not respond to Conrail's request for summary judgment on the claim of a defective locomotive.

[10] Under Fed.R.Civ.P. 56(e), plaintiff, as the non-moving party, bears the responsibility to demonstrate that summary judgment is inappropriate. "The adverse party may not rest upon the mere allegations or denials of [his] pleadings, but [his] response, by affidavits or otherwise ..., must set forth specific facts showing there is a genuine issue for trial. If [he] does not so respond, summary judgment, if appropriate, shall be entered against [him]." Fed.R.Civ.P. 56(e). "[I]f the non-moving party fails to discharge that burden [of setting forth specific facts showing there is a genuine issue for trial]--for example, by remaining silent--its opportunity is waived and its case wagered." *Gudrino v. Brookfield Township Trustees*, 980 F.2d 399, 405 (6th Cir.1992). As plaintiff has not responded to Conrail's request for summary judgment on the claim of a defective locomotive, summary judgment will be granted to Conrail on such claim.

IV. CONCLUSION

For the reasons set forth above, this Court will grant Conrail's motion for partial summary judgment and General

Motors motion for summary judgment, Plaintiff's cause of action against General Motors is, therefore, closed. Plaintiff still, however, has a cause of action against Conrail based on Count II of the Complaint which deals with the allegation of an unsafe crossing.

IT IS SO ORDERED.

JUDGMENT ENTRY

For the reasons stated in the Memorandum Opinion filed contemporaneously with this entry, IT IS HEREBY ORDERED, AD-JUDGED and DECREED that the motion for summary judgment of defendant General Motors Corporation, Electro-Motive Division is granted. Further, the motion for partial summary judgment of defendant Consolidated Rail Corporation is also granted.

IT IS SO ORDERED.

APPENDIX D

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO,
WESTERN DIVISION

ORDER by Judge J. Katz

District Court Case №. 3:93-CV-7233
Filed March 24, 1996

Pages D-1 thru D-6

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OHIO
WESTERN DIVISION

ROBERT S. SPRINGSTON,	)	
	)	**Case No.3:93 CV 7233**
Plaintiff,	)	
	)	
-v-	)	**ORDER**
	)	
CONSOLIDATED RAIL	)	**KATZ, J.**
CORPORATION, *et al.*,	)	**Filed**
Defendants.	)	**Mar. 24 1996**

This case is scheduled for trial on March 26, 1996. The Court anticipates that trial will last approximately two weeks. A number of motions, primarily motions *in limine,* remain for the Court's attention.

I. Defendant's Motion *in Limine* (Doc. No.196) for an order barring Plaintiff from presenting evidence on the availability or use of locomotive equipment different from what was on the locomotive involved in this case, including but not limited to "ditch lights," different horns, etc. is **GRANTED**. The Court has already granted summary judgment that the equipment on the locomotive was not defective or substandard.

II. **Defendant's Motion *in Limine*** (Doc. No.196) for an order barring Plaintiff from presenting evidence that the locomotive was defective or substandard is **GRANTED**, for the reason given in (I).

III. **Defendant's Motion *in Limine*** (Doc. No.196) for an order barring Plaintiff from presenting evidence on the sound level of the locomotive horn is **GRANTED**. It is not disputed that the volume met FRA standards.

IV. **Defendant's Motion *in Limine*** (Doc. No.196) for an order barring Plaintiff from presenting any materials regarding plans for a project to install active warning devices at the crossing is **GRANTED**. Such evidence is barred under 23 U.S.C. § 409.

V. **Defendant's Motion *in Limine*** (Doc. No.196) for an order barring Plaintiff from presenting evidence regarding implementation of a project to install active warning devices at the crossing is **GRANTED**. Such evidence is barred under 23 U.S.C. § 409.

VI. **Defendant's Motion *in Limine*** (Doc. No.196) for an order barring Plaintiff from presenting evidence concerning prior vehicle/train collisions at the crossing that occurred under circumstances different from those of this case is **GRANTED**. Such evidence is irrelevant. This

order does not bar Plaintiff from presenting evidence concerning prior vehicle/train collisions at the crossing that occurred under circumstances highly similar to those of this case.

VII. Defendant's Motion *in Limine* (Doc. No.196) for an order barring Plaintiff from arguing that the train was traveling at an unsafe speed at the time of the collision is **GRANTED**. There has been no allegation that the train was exceeding the track speed limit at the time of the collision.

VIII. Defendant's Motion *in Limine* (Doc. No.196) for an order barring Plaintiff from presenting night-time videotapes of the crossing from June 12, 1991 and June 3, 1992 is **DENIED**, in accordance with the agreement of the parties.

IX. Defendant's Motion *in Limine* (Doc. No.196) for an order barring Plaintiff from presenting evidence suggesting that Robert Springston remembers any circumstances of the accident is **DENIED**. Should Plaintiff now claim that he remembers any circumstances of the accident, the proper way to deal with such matter is by impeachment on cross-examination.

X. Defendant's Motion *in Limine* (Doc. No.196) for an order barring Plaintiff from presenting any materials that

have not been disclosed is **GRANTED**, pursuant to Fed. R. Civ. P.37(c).

XI. Defendant's Motion *in Limine* (Doc. No.197) for an order excluding the testimony of Plaintiff's witness August Westphal is **GRANTED**.

XII. Defendant's Motion *in Limine* (Doc. No.198) for an order excluding the testimony of Plaintiff's witness William Douglas Berg is **GRANTED IN PART** and **DENIED IN PART**.

Testimony that the crossing should have been equipped with active warning devices will be excluded. Testimony that Plaintiff had insufficient time to discover and react to the train will be excluded.

Testimony that the train crew may have been mistaken in perceiving the dome light to be on in Plaintiff's truck will be permitted.

As to testimony that the crossing was extra-hazardous, such testimony will be excluded to the extent that Berg's opinion is based on information contained in records that are made impermissible under 23 U.S.C. § 409, *i.e.*, information compiled for evaluating or planning safety enhancement of the crossing, and permitted to the extent that Berg's opinion is based on information obtained from other sources.

XIII. Defendant's Motion *in Limine* (Doc. No.203) for an order barring Defendant from arguing that Plaintiff had a duty to approach the crossing at slower than 25 miles per hour is **GRANTED**.

XIV. Defendant's Motion *in Limine* (Doc. No.204) for an order barring Defendant from arguing that Defendant had no duty to install active warning devices at the crossing unless directed to do so pursuant to a program governed by the Federal Railroad Administration is **GRANTED**, under the rule of *CSX Transp., Inc. v. Easterwood,* 113 5. Ct. 1732 (1993).

XV. Defendant's Motion *in Limine* (Doc. No.204) for an order barring Defendant from arguing that Defendant could not have installed active warning devices at the crossing without permission from the Public Utilities Commission of Ohio is **GRANTED**.

XVI. Defendant's Motion *in Limine* (Doc. No.204) for an order barring Defendant from arguing that Defendant satisfied its legal obligations by maintaining a crossbuck at the crossing is **DENIED**. That is a question for the jury.

XVII. Defendant's Motion *in Limine* (Doc. No.205) for an order barring Defendant from presenting evidence

concerning Plaintiff's mention of suicide is **GRANTED**. Such evidence is irrelevant and unfairly prejudicial.

XVIII. Defendant's Motion *in Limine* (Doc. No.206) for an order barring Defendant from presenting evidence concerning Plaintiff's use of marijuana is **GRANTED**. All evidence is that Plaintiff was not under the influence of marijuana at the time of the accident, and evidence as to Plaintiff's marijuana use at other times is irrelevant and unfairly prejudicial.

XIX. Defendant's Motion *in Limine* (Doc. No.207) for cancellation of the scheduled jury view is **DENIED**, in accordance with the agreement of the parties.

IT IS SO ORDERED

DAVID A KATZ
UNITED STATES DISTRICT JUDGE

APPENDIX E

45 U.S.C. §§ 22 and 23 (repealed) E1
45 U.S.C. § 421 (repealed) E1
45 U.S.C. § 431(u) E3
45 U.S.C. § 434 (1992) (repealed) E5
49 U.S.C. §§ 20101, 20102 . . . . . E6
49 U.S.C. § 20106 . . . . . E7
49 U.S.C. § 20143 . . . . . E8
49 U.S.C. § 20301 . . . . . E11
49 U.S.C. § 20302 . . . . . E12

Pages E-1 thru E-15

LOCOMOTIVE BOILER INSPECTION ACT
45 U.S.C. §§ 22 and 23 (repealed)

§ 22 Inspection of locomotives and appurtenances; definitions

When used in this Act, the terms "carrier" and "common carrier" means a common carrier by railroad, or partly by railroad and partly by water, within the continental United States, subject to the Interstate Commerce Act, as amended, excluding street, suburban, and interurban electric railways unless operated as a part of a general railroad system of transportation. The term "railroad" as used in this Act shall include all the roads in use by any common carrier operating a railroad, whether owned or operated under a contract, agreement, or lease, and the term "employees" as used in this act shall be held to mean persons actually engaged in or connected with the movement of any train.

§ 23 Use of unsafe locomotives and appurtenances unlawful; inspection and tests

It shall be unlawful for any carrier to use or permit to be used on its line any locomotive unless said locomotive, its

boiler, tender, and all parts and appurtenances thereof are in proper condition and safe to operate in the service to which the same are put, that the same may be employed in the active service of such carrier without unnecessary peril to life or limb, and unless said locomotive, its boiler, tender, and all parts and appurtenances thereof have been inspected from time to time in accordance with the provisions of this Act and are able to withstand such test or tests as may be prescribed in the rules and regulations hereinafter provided for.

FEDERAL RAILROAD SAFETY ACT
45 U.S.C. §§ 421, 431, 434 (1992)
(repealed)

§ 421 Congressional declaration of purpose

The Congress declares that the purpose of this Act is to promote safety in all areas of railroad operations and to reduce railroad-related accidents, and to reduce deaths and injuries to persons and to reduce damage to property caused by accidents involving any carrier of hazardous materials.

§ 431(u) Locomotive conspicuity

(1) The Secretary shall conduct a review of the Department of Transportation's rules with respect to locomotive conspicuity research no later than December 31, 1993. As part of this review, the Secretary shall collect relevant data from operational experience by railroads having enhanced conspicuity measures in service.

(2) Not later than December 31, 1992, the Secretary shall issue interim regulations identifying ditch lights, crossing lights, strobe lights, and oscillating lights as interim locomotive conspicuity

measures, and authorizing and encouraging installation and use of such measures.

(3) Not later than June 30, 1994, the Secretary shall initiate a rulemaking proceeding to issue final regulations requiring substantially enhanced locomotive conspicuity measures. In such rulemaking proceeding, the Secretary shall consider, at a minimum -

(A) revisions to the locomotive headlight standard, including standards for placement and intensity;

(B) requiring use of reflective materials to enhance locomotive conspicuity;

(C) requiring use of additional alerting lights (including ditch, crossing, strobe and oscillating lights).

(D) requiring use of auxilliary lights to enhance locomotive conspicuity when viewed from the side;

(E) the effect of any enhanced conspicuity measures on the vision, health and safety of train crew measures.

(4) The Secretary will issue final regulations requiring enhanced locomotive conspicuity measures no later than June 30, 1995.

§ 434 National uniformity of laws, rules, regulations, orders, and standards relating to railroad safety; State regulation

The Congress declares that laws, rules, regulations, orders, and standards relating to railroad safety shall be nationally uniform to the extent practicable. A State may adopt or continue in force any law, rule, regulation, order, or standard relating to railroad safety until such time as the Secretary has adopted a rule, regulation, order, or standard covering the subject matter of such State requirement. A State may adopt or continue in force an additional or more stringent law, rule, regulation, order, or standard relating to railroad safety when necessary to eliminate or reduce an essentially local safety hazard, and when not incompatible with any Federal law, rule, regulation, order, or standard, and when not creating an undue burden on interstate commerce.

FEDERAL RAILROAD SAFETY AUTHORIZATION ACT
49 U.S.C. §§ 20101, 20102, 20106, 20143

§ 20101. Purpose

The purpose of this chapter [49 USC §§ 20101 et seq.] is to promote safety in every area of railroad operations and reduce railroad-related accidents and incidents.

§ 20102. Definitions

In this part [49 USC §§ 20101 et seq.]-

(1) "railroad"-

(A) means any form of nonhighway ground transportation that runs on rails or electromagnetic guideways, including-

(i) commuter or other short-haul railroad passenger service in a metropolitan or suburban area and commuter railroad service that was operated by the Consolidated Rail Corporation on January 1, 1979; and

(ii) high speed ground transportation systems that connect metropolitan areas, without regard to whether those systems use new

technologies not associated with traditional railroad; but

(B) does not include rapid transit operations in an urban area that are not connected to the general railroad system of transportation.

(2) "railroad carrier" means a person providing railroad transportation.

§ 20106. National uniformity of regulation

Laws, regulations, and orders related to railroad safety shall be nationally uniform to the extent practicable. A State may adopt or continue to force a law, regulation, or order related to railroad safety until the Secretary of Transportation prescribes a regulation or issues an order covering the subject matter of the State requirement. A State may adopt or continue in force an additional or more stringent law, regulation, or order related to railroad safety when the law, regulation, or order-

(1) is necessary to eliminate or reduce an essentially local safety hazard;

(2) is not incompatible with a law, regulation, or order of the United States Government; and

(3) does not unreasonably burden interstate commerce.

§ 20143. Locomotive visibility
(a) Definition.

In this section, "locomotive visibility" means the enhancement of day and night visibility of the front end unit of a train, considering in particular the visibility and perspective of a driver of a motor vehicle at a grade crossing.

(b) Interim regulations. Not later than December 31, 1992, the Secretary of Transportation shall prescribe temporary regulations identifying ditch, crossing, strobe, and oscillating lights as temporary locomotive visibility measures and authorizing and encouraging the installation and use of those lights. Subchapter II of chapter 5 of title 5 [5 USC §§ 551 et seq.] does not apply to a temporary regulation or to an amendment to a temporary regulation.

(c) Review of regulations. The Secretary shall review the Secretary's regulations on locomotive visibility. Not later than December 31, 1993, the Secretary shall complete the current research of the Department of Transportation on locomotive visibility. In conducting the review, the Secretary shall collect relevant information from operational experience by rail carriers using enhanced visibility measures.

(d) Regulatory proceedings. Not later than June 30, 1994, the Secretary shall begin a regulatory proceeding to prescribe final

regulations requiring substantially enhanced locomotive visibility measures. In the proceedings, the Secretary shall consider at least-

(1) revisions to the existing locomotive headlight standards, including standards for placement and intensity;

(2) requiring the use of reflective material to enhance locomotive visibility;

(3) requiring the use of additional alerting lights, including ditch, crossing, strobe, and oscillating lights;

(4) requiring the use of auxiliary lights to enhance locomotive visibility when viewed from the side;

(5) the effect of an enhanced visibility measure on the vision, health, and safety of train crew members; and

(6) separate standards for self-propelled, push-pull, and multi-unit passenger operations without a dedicated head end locomotive.

(e) Final regulations.

(1) Not later than June 30, 1995, the Secretary shall prescribe final

regulations requiring enhanced locomotive visibility measures. The Secretary shall require that not later than December 31, 1997, a locomotive not excluded from the regulations be equipped with temporary visibility measures under subsection (b) of this section or the visibility measures the final regulations require.

(2) In prescribing regulations under paragraph (1) of this subsection, the Secretary may exclude a category of trains or rail operations from a specific visibility requirement if the Secretary decides the exclusion is in the public interest and is consistent with rail safety, including grade-crossing safety.

(3) A locomotive equipped with temporary visibility measures prescribed under subsection (b) of this section when final regulations are prescribed under paragraph (1) of this subsection is seemed to be complying with the final regulations for 4 years after the final regulations are prescribed.

FEDERAL SAFETY APPLIANCE ACT

49 U.S.C. §§ 20301, 20302

§ 20301. Definition and nonapplication
(a) Definition.

In this chapter [49 USC §§ 20301 et seq.], "vehicle" means a car, locomotive, tender, or similar vehicle.

(b) Nonapplication. This chapter [49 USC §§ 20301 et seq.] does not apply to the following:

(1) a train of 4-wheel coal cars.

(2) a train of 8-wheel standard logging cars if the height of each car from the top of the rail to the center of tne coupling is not more than 25 inches.

(3) a locomotive used in hauling a train referred to in clause (2) of this subsection when the locomotive and cars of the train are used only to transport logs.

(4) a car, locomotive, or train used on a street railway.

§ 20302. General requirements
(a) General.

Except as provided in subsection (c) of this section and section 20303 of this title, a railroad carrier may use or allow to be used on any of its railroad lines-

(1) a vehicle only if it is equipped with-

(A) couplers coupling automatically by impact, and capable of being uncoupled, without the necessity of individuals going between the ends of the vehicles;

(B) secure sill steps and efficient hand brakes; and

(C) secure ladders and running boards when required by the Secretary of Transportation, and, if ladders are required, secure handholds or grab irons on its roof at the top of each ladder;

(2) except as otherwise ordered by the Secretary, a vehicle only if it is equipped with secure grab irons or handholds on its ends and sides for greater security to individuals in coupling and uncoupling vehicles;

(3) a vehicle only if it complies with the standard height of drawbars

required by regulations prescribed by the Secretary;

(4) a locomotive only if it is equipped with a power-driving wheel brake and appliances for operating the train-brake system; and

(5) a train only if-

(A) enough of the vehicles in the train are equipped with power or train brakes so that the engineer on the locomotive hauling the train can control the train's speed without the necessity of brake operators using the common hand brakes for that purpose; and

(B) at least 50 percent of the vehicles in the train are equipped with power or train brakes and the engineer is using the power or train brakes on those vehicles and on all other vehicles equipped with them that are associated with those vehicles in the train.

(b) Refusal to receive vehicles not properly equipped. A railroad carrier complying with subsection (a)(5)(A) of this section may refuse to receive from a railroad line of a connecting railroad carrier or a shipper vehicle that is not equipped with power or train brakes that will work and readily interchange with the power or train brakes in

use on the vehicles of the complying railroad carrier.

(c) Combined vehicles loading and hauling long commodities. Notwithstanding subsection (a)(1)(B) of his section, when vehicles are combined to load and haul long commodities, only one of the vehicles must have hand brakes during the loading and hauling.

(d) Authority to change requirements. The Secretary may-

(1) change the number, dimensions, locations, and manner of application prescribed by the Secretary for safety appliances required by subsection (a)(1)(B) and (C) and (2) of this section only for good cause and after providing an opportunity for a full hearing;

(2) amend regulations for installing, inspecting, maintaining, and repairing power and train brakes only for the purpose of achieving safety; and

(3) increase, after an opportunity for a full hearing, the minimum percentage of vehicles in a train that are required by subsection (a)(5)(B) of this section to be equipped and used with power or train brakes.

(e) Services of Association of American Railroads. In carrying out subsection (d)(2) and (3) of this section, the Secretary may use the services of the Association of American Railroads.